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IN THE COURT OF APPEALS OF INDIANA

JOSHUA CLAWSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A04-0608-CR-410
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE CIRCUIT COURT
The Honorable Donald L. Daniel, Judge
Cause No. 79C01-0506-FA-11

April 11, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Joshua Clawson pled guilty to robbery resulting in serious bodily injury,[1] a Class A felony. The trial court sentenced Clawson to forty-five years with thirty-five years executed and ten years suspended to probation. Clawson raises the following issues, which we consolidate and restate as:

I. Whether Clawson's sentence is appropriate in light of the nature of the offense and his character.

II. Whether the $500.00 public defender fee exceeded the statutory limit set forth in IC 35-33-7-6.

We affirm in part, reverse in part, and remand.

FACTS AND PROCEDURAL HISTORY

In February 2005, Clawson, Patricia Floyd, and another female friend conspired to have Clawson rob the home of Floyd's estranged in-laws in order to obtain money to pay a cocaine debt. The plan was to rob the home while the in-laws were out of the house. On two occasions, Clawson went to the home intending to commit the robbery but, finding the in-laws at home, aborted his plan. Floyd, who had continued to purchase cocaine on credit and needed the proceeds from the robbery to pay off the debt, continued to pressure Clawson to commit the crime.

Floyd introduced Clawson to Matthew Flowers, who agreed to help Clawson with the robbery. On the morning of March 13, 2005, Clawson and Flowers drove to Floyd's in-laws' home and kicked in the rear door. Upon entering the residence, Clawson encountered Floyd's mother-in-law, instructed her to return to her bedroom, and proceeded to the basement while Flowers remained upstairs. During the robbery,

[1] *See* IC 35-42-5-1.

Flowers punched Floyd's father-in-law causing him to sustain a depressed nasal fracture, left and right lobe contusions, a closed head injury, and a left eye intraocular lens dislocation.

In May 2005, Clawson told the police that he wanted to take responsibility for his actions in the robbery. Clawson was arrested and charged with robbery resulting in serious bodily injury, a Class A felony, burglary resulting in serious bodily injury, a Class A felony, theft, a Class D felony, conspiracy to commit burglary, a Class B felony, and being an habitual offender. Pursuant to a plea agreement, Clawson pled guilty to robbery resulting in serious bodily injury, and the trial court dismissed the remaining counts. *Appellant's App.* at 13. On March 31, 2006, the trial court accepted Clawson's plea and sentenced him to forty-five years with ten years suspended to probation, ordered restitution in the amount of $11,620.29, and imposed a $500.00 fee for public defender services. Clawson now appeals his sentence and the imposition of the public defender fee. Additional facts are included as necessary.

DISCUSSION AND DECISION

I. Clawson's Sentence

Clawson contends that the trial court erred in imposing his sentence.[2] We first note that Clawson was sentenced under the "presumptive" sentencing scheme. Clawson committed this crime in March 2005. In the meantime, effective April 25, 2005, our

[2] Clawson appeals his sentence raising three separate issues: (1) whether the trial court properly identified and balanced aggravating and mitigating circumstances; (2) whether his sentence was appropriate in light of the nature of the offense and his character; and (3) whether the trial court committed a *Blakely* violation by failing to have a jury determine aggravators beyond a reasonable doubt. *See Blakely v. Washington*, 542 U.S. 296 (2004). Here, the facts cause these issues to overlap. As such, we address them in one section.

legislature replaced the presumptive "fixed" term sentencing scheme with the current "advisory" sentencing scheme to comply with holdings in *Blakely v. Washington*, 542 U.S. 296 (2004) and *Smylie v. State*, 823 N.E.2d 679 (Ind. 2005). The new scheme allows a trial court to impose any lawful sentence "regardless of the presence or absence of aggravating circumstances or mitigating circumstances." IC 35-38-1-7.1(d). Clawson pled guilty and was sentenced in March 2006. This court is divided as to whether the presumptive sentencing scheme or the amended advisory sentencing scheme applies to a crime committed before April 25, 2005, but sentenced after that date. *See, e.g., Weaver v. State*, 845 N.E.2d 1066, 1072 (Ind. Ct. App. 2006), *trans. denied* (application of new sentencing statutes to defendants convicted before effective date of amendments, but sentenced afterward, violates prohibition against ex post facto laws); *but see Samaniego-Hernandez v. State*, 839 N.E.2d 798, 805 (Ind. Ct. App. 2005) (change in sentencing statute is procedural rather than substantive; therefore, we analyze this issue under amended statute that provides for advisory rather than presumptive sentences).

Here, we need not analyze the difference between the two statutes because Clawson's sentence is valid under either scheme. In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), the United States Supreme Court stated the following rule: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In *Blakely*, the Supreme Court clarified that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*."

Blakely, 542 U.S. at 303 (emphasis in original). Clawson's sentence does not trigger *Blakely* concerns because it falls within the maximum sentence the trial judge could impose based solely on Clawson's prior convictions and the facts to which he admitted.

During the sentencing hearing, the trial court accepted Clawson's plea. Prior to sentencing, the prosecutor made the following comments:

> We have a plea agreement that does not include a *Blakely* waiver. The juvenile history—or, excuse me, the juvenile adjudications, the criminal history and the fact that the defendant was on probation at the time he committed this offense do not have to be found to be true beyond a reasonable doubt by the—by a court. So those are in the purview of any sentencing judge. As far as the circumstances of the crime involved, unless those are found true beyond a reasonable—er, beyond a reasonable doubt by the jury or admitted to by the defendant, they are not—they may not necessarily be included. And that's why I want to make sure that it's on the record that the defendant in his own words has included circumstances of the offense.

Appellant's App. at 71-72. The prosecutor then cited to Clawson's criminal history and his own admissions, including that he planned the crime for over two weeks and that he continued the crime after encountering the mother-in-law. *Id*. at 72-75.

During sentencing, the trial court stated:

> [We find] as a mitigating circumstance that the defendant has taken responsibility for his actions by entering a plea of guilty in this matter and the defendant has expressed sincere remorse as a part of that plea. Additionally, as a mitigating circumstance the fact that the defendant has a five year old daughter is a mitigating circumstance. If he had been more involved in the child's life and had been paying support on a regular basis that would be more of a mitigating circumstance but you haven't done much for her, Mr. Clawson. The fact that the defendant served in the United States Marine Corps is a mitigating circumstance. The Court notes that you received a general discharge rather than an honorable discharge but this is still somewhat of a mitigating circumstance. As an aggravating circumstance the court finds the defendant's juvenile record, which consists of one juvenile adjudication, and four petitions to modify which were granted, is an aggravating circumstance. The defendant's adult history

> which, [sic] consists of three misdemeanor convictions, four felony convictions, one of which was accompanied by a finding of habitual substance offender. On six different occasions the defendant failed to appear on various occasions and warrants were issued for defendant's arrest and on four occasions petition to revoke probation were filed and found true. That criminal history is a very aggravating, a very significant aggravating circumstance. The fact that the defendant was on probation at the time this offense was committed is an additional aggravating circumstance. The fact that the defendant, by his own admission, carefully planned over a period of time to commit this offense is an aggravating circumstance. And the nature and circumstance of this crime in that defendant when confronted by the victim did not cease his criminal activity but continued in the criminal enterprise is also an aggravating circumstance. The court finds that the aggravating circumstances far outweigh the mitigating circumstances and accordingly the court sentences the defendant on count one to forty-five years at the department of corrections. The court orders that thirty-five years be executed.

Id. at 77-78. Under this analysis the trial court committed no *Blakely* violations and Clawson's sentence would be the same under either a presumptive or advisory scheme.

Clawson also contends that his sentence is inappropriate. Under Article VII, Section 6 of the Indiana Constitution, we have the constitutional authority to revise a sentence if, after due consideration of the trial court's decision, the trial court's sentence is "inappropriate in light of the nature of the offense and the character of the offender." *Smith v. State*, 839 N.E.2d 780, 787 (Ind. Ct. App. 2005) (citing Ind. Appellate Rule 7(B)).

Clawson argues that the forty-five year sentence, which is "five years short of the absolute maximum," was inappropriate. *Appellant's Br*. at 13. Citing to his remorse, his cooperation with police, his difficult childhood, his education, his attendance at church, and the fact that he had a five-year-old daughter, and arguing that his prior offenses were related to substance abuse, Clawson contends that, on balance, his forty-five year

sentence was inappropriate. While noting that the trial court "rightfully concluded that [he] had prior criminal convictions," Clawson contends "there was little evidence that [he] had any violent prior convictions, save a 2001 Battery conviction." *Id.*

The trial court sentenced Clawson to forty-five years, ten of which were suspended to probation, by noting:

> you're not the worst possible violator of this kind of crime. But you are, sir, when you committed this crime you're absolutely the worst nightmare of people like the victims in this crime. You're quite right that you've taken away something from them that you can never give back. And part of my duty here is to protect the remainder of the citizens of this county from seeing that this kind of thing can [sic] happen again. I hope that when you complete [your] sentence that you will be able to get out, get back involved in your daughter's life and become a contributing member of society. Good luck to you Mr. Clawson.

Appellant's App. at 79-80. The trial court's comments highlight factors we consider in a review under Indiana Appellate Rule 7(B). While Clawson's remorse and troubled childhood are considerations, these are outweighed by the nature of the offense and his character. Here, Clawson planned over a period of time to rob Floyd's in-laws in order to pay a drug debt. Two failed attempts at the robbery did not deter him from continuing with his plan. He and Flowers entered the in-laws' home during the early morning hours when the in-laws were most likely to be at home. After due consideration of the trial court's decision, we are not convinced that Clawson's sentence was inappropriate in light of the nature of the offense and his character.

II. Public Defender Fee

Clawson finally contends that the trial court erred in ordering him to pay a fee of $500.00 for the services of his public defender. In addressing Clawson's claim, we first note that IC 35-33-7-6(c) provides in part:

> (c) If the court finds that the person is able to pay part of the cost of representation by the assigned counsel, the court shall order the person to pay the following:
>
> (1) For a felony action, a fee of one hundred dollars ($100).

The State concedes, and we agree, that the trial court never made an explicit finding, as required by IC 35-33-7-6, as to whether Clawson was indigent or whether he was able to pay for part of his representation. Because the trial court failed to follow the steps necessary to impose a public defender services fee, we remand this case with instructions for the trial court to reverse its assessment of the $500.00 fee. *May v. State*, 810 N.E.2d 741, 746 (Ind. Ct. App. 2004). On remand, if the trial court wishes to impose a public defender services fee, the court must follow the statutory requirements. *Id*.

Affirmed in part, reversed in part, and remanded.

RILEY, J., and FRIEDLANDER, J., concur.